No. 16238

United States
Court of Appeals
for the Ninth Circuit.

ANTHONY FRISONE,

Appellant,

-vs-

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

APPELLANT'S CLOSING BRIEF

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I

PREDJUDICIAL ERROR DID OCCUR BY JUDGE REFUSING OFFER OF PROOF

ARGUMENT

Under that portion of appellees argument as designed at "A". (See Appelee's Brief, page 8). The appellee there contends the appellant was not predjudiced by the court's refusal to allow an offer of proof. This occurred after the question as to whether or not appellant had in the past suffered from a mental illness had been objected or on general grounds. The Court had in ruling declared:

No. [illegible]

United States
Court of Appeals
for the [illegible] Circuit

ANTHONY PATCHEL,

Appellant,

Vs.

UNITED STATES OF AMERICA,

Appellee.

PROCEEDINGS HAD AND ORDER BY
JUDGE WARDING DENYING [illegible]

UNDER

Under that portion of Appellee's argument
as appears at "A". Does Appellee's brief, page 6:
The Appellee finds [illegible] appellant was
manipulated by the narcotic steward in order to
effect a plea". This requires after the question
is to whether or not appellant had in the least
suffered from a mental illness [illegible] been weighed
at the several accused. The [illegible] and is [illegible]
[illegible]

"I cannot see any bearing upon the issue here".

(See Transcript of Record, page 168)

Under this state of the record it is clear that a full offer of proof was imperative. The facts sought to be proved were imperfectly developed because of the refusal of the trial court to allow a proper offer of proof. Although the Rule of Criminal Procedure contains no provision comparable to the Rules of Civil Procedure. (See Federal Rule of Criminal Procedure 43C) under which a party may make an offer of proof where objection has been sustained to a question, an offer of proof is nevertheless appropriate and proper in order to make a record of what examining counsel expects to elicit from a witness if witness were permitted to answer.

(See McDonald vs. United States 246 - Federal (2) 727)

It is quite apparent from the trial courts ruling that the court misapprehended the purpose of the testimony and erroneously ascribed it as an attempt to prove a defense of insanity. (See Transcript of Record, page 168 and 169. See also Appellee's Brief Appendix "A" Motion for New Trial).

An offer of proof was certainly in order to fully protect the appellant's rights. If counsel had been permitted to make such an offer the error here complained of could well have been avoided. It is the rule in

connection with offers of proof that such offer embody the specific facts or facts in such connection and in such terms as to be apprehended and ruled upon in the intended sense by the trial judge and in order that the fact or facts may be applied in the appellate court in the proper light to test the ruling if adverse. (See Reynolds vs. Continental Insurance Co. #36 Mich. 131)

Under the proceeding in the lower court your appellant was arbitrarily denied the right he contended for to make such a proper offer of proof. The necessity for such an offer in the case at bar and the predjudice of the ruling are too apparent from mere observation of the record in the case to require further comment. (See Transcript of Record pages 168 and 169) Where the questions do not clearly show the nature of the testimony an offer of proof ought to be received.

State vs. Barker - 43 Kan 262 -- 24 Pac 575

Eagon vs Eagon - 68 Kan 697 -- 57 Pac .942

II

APPELLEE WAIVED ITS INCOMPENTENCY OBJECTION AT TIME OF TRIAL; EVEN SO, THE ELICITED TESTIMONY WAS COMPETENT

The proferred testimony is attacked on the ground that the desired testimony was incompetent. Inasmuch as counsel for appellee did not object at time of trial on

this ground, the objection is waived, including its presentation on appeal. An appellee, it seems, should not be permitted to devise new theories of affirmance, which were not presented to the trial court, any more than an appellant is permitted to urge new theories of reversal. The analogy is so apt and the propositions so recognized that appellant need not refer This Court to appropriate authorities, of which there are many.

At time of trial, no incompetency objection was interposed. The appellee's attorney contended that the propounded question was "improper and immaterial and irrelevant". In other words, it was generally objected to. Transcript of Record, p. 169.

There are certain grounds on which one can object to a propounded question: incompetent, irrelevant, immaterial, hearsay, etc. The law of evidence has limited the grounds in this respect, and "impropriety" is not one of them.

Withers vs. Sandlin, 36 Fla. 610, 18 So. 856.

However, "immaterial and irrelevant" do state, through general terms, a distinct and substantial grounds for exclusion. McCormick on Evidence, 1954 edition, P. 119. This objection the trial judge impliedly sustained, in saying "I cannot see any bearing upon the issue here". Transcript of Record, page 169.

In light of the foregoing, it is obvious that the only question before This Court, as was the case in the court below, is the materiality and relevancy of the proffered testimony; no incomptency ground was raised at that time, and accordingly none should be considered here.

However, if This Court determines that the competency question is properly before it, appellant submits the remainder of this portion in support of the propriety of the question asked.

It will be recalled that the specific interrogatory propounded was: "Mr. Frisone, I'm going to ask you if you have ever suffered from any mental illness in the past". Transcript of Record, page 168. The appellant was not asked if he was insane or for what he was treated. He was simply asked if he was mentally ill at any time in the past. The question was obviously preliminary, but inasmuch as the trial judge wished no further evidence on the subject, did not allow counsel to complete his avowal, and ruled out the relevancy of such testimony, as a defense to a perjury charge, This Court cannot speculate as to the development of this defense, had it been allowed. Op. Br., p. 8.

"A person can testify to whether or not he has had a particular disease or injury if the facts are within his knowledge". Witkin's California Evidence, 1958 edition, p. 198, in which Frederick vs. Federal Life Insur-

ance Co., 13 Cal. App. 2nd 585, 57 Pac. 2nd 235, is cited. In the Frederick case, the plaintiff-witness was asked: "Have you at any time in your life had a disease commonly known as gonorrhea?" The reviewing court held it was prejudicial error to sustain an objection to this question, citing, among other cases, North Elk Oil Co. vs. Industrial Acc. Comm., 81 Cal. App. 582, 254 P. 582.

The 7th Circuit has held that the giving of testimony by a lay defendant-witness, as to his mental and physical condition, is within the sound discretion of the trial court. Piquett vs. United States, 81 Fed. 2nd 75. Hence, such testimony is not incomptent (in the case at bar, neither counsel asked the trial judge to invoke his discretion in this regard, since the proffered evidence was ruled out strictly on a relevancy point).

Accord 3, Nichols' Applied Evidence (pub. 1928), p. 3031, section 27, and cases citing in supporting footnote; Kinner vs. Boyd, 139 Iowa 14, 116 N.W. 1044 and Ferguson vs. Davis County, 57 Iowa 601, 10 N.W. 906.

The Pennsylvania, Alabama and Wyoming cases cited by appellee on pages 10 and 11 of its brief are unavailing, because those were concerned with insanity trials. Appellant and the trial court both recognized that there

Record, page 169)

The New York decision ruled out a lay witness-plaintiff's testimony in a damage suit, which sought to establish a defective mind by reason of the complained of accident. There is a difference between a demented condition and a presently poor or forgetful memory following a mental illness. The courts have expressly noted the dissimilarity in criminal, perjury trials. McCurd vs. State, 83 Ga. 521, 10 S.E. 437, Leoptrot vs. State, 51 Fla. 57, 40 So. 616. In the latter case, the Florida supreme court observed that a lay person could not testify on the subject of insanity vel non, but that in the area of mental condition could be elecited from a defendant-witness as well, as the Florida opinion implies.

State vs. Coyne and People vs. Doody (pgs. 11,12 Appellee's Brief) have been heretofore discussed at sufficient length, and hence appellant will not restate the law of those cases as it applies to the appeal within (Op. Br., pgs. 11-13, 15 respectively). Suffice it to say that who gives the testimony is unimportant, so long as the witness is competent. Criminal defendants are qualified to testify on their own behalf, in the federal courts, and have been so since the Act of March 16, 1878. It follows, therefore, that appellee's distinction between non-defendant and defendant-witnesses

is without merit.

Appellee further attacks the question with the charge that the contemplated answer would have been conclusory in that a statement of casual connection between the mental illness and the witness' subsequent failure of memory was called for. While this was not the precise case, the question calling for a simple yes-or-no answer, appellant is willing to admit that as an aspect of all of the defense evidence the showing of this cause-and-effect would have been corroborative and hence desirable. But, as appears from the record, the trial judge desired no further testimony of the witness or other evidence in general on the point, because he considered it irrelevant. (Transcript of Record, page 169)

Nothwithstanding this attack, the cases are legion which permit a party-witness to testify as to ill effects following an accident or injury. So, in Whidden vs. Malone, Ala. supreme ct., 124 So. 516, it was held that a plaintiff in a negligence suit could testify that his memory had become impaired after the accident. Moreover, in State vs. Lindsay, 85 Kan. 192, 116 Pac. 209, a party-witness was allowed to testify that he was confined to bed after the accident and because of the confinement excessively worried over the forthcoming

Pac. 130, testimony of a party-witness that she was extremely nervous after the accident, that street noises affected her, particularly the noise of a bell or an automobile or police ambulance, and that she was not so affected before the accident, was held to be admissible. The connection between the undesirable consequences and the immediate injury is usually left to inference or expert testimony which establishes a casual relationship, or both.

United States vs. Rose, Third circuit, 215 Fed. 2nd 617, went further, and is additionally valuable in that the criminal charge was perjury and the defense lapses of memory. In an affidavit in support of a pretrial motion to inspect and copy his prior testimony before a grand jury, defendant Rose averred that it was necessary for his defense in that, as a result of suffering from diabetes and a heart ailment, he experienced lapses of memory. The Third Circuit recognized this as a valid defense, and reversed his conviction, declaring that defendant Rose should have been given a transcript of his challenged former testimony. U.S. vs Remington, Second Circuit, 191 Fed. 2nd 246, was cited by the Third Circuit in support of his disposition, and This Court's attention is called to both decisions in appellant's opening brief (pp. 9-11); yet, appellee's brief is silent as to this state decisis.

Appellee relies on the doctrine of Spivey vs. Atteberry, Okla. supreme court, 230 Pac. 2nd 814, somewhat markedly. In that case, the plaintiff appellee was bitten by a dog, and in the course of the treatment of the wound, received an hyperdermic injection of anti-tetanus serum. He testified that as a consequence of the shot, he became ill, suffered a breaking out on and an itching of his body, and that his flesh swelled and his joints ached. These symptoms required hospitalization and, as a result, absenteeism from the plaintiff's job. The supreme court held that without more positive proof between the bite and these consequential injuries the judgment fro the plaintiff below was based on insufficient, conjectural evidence. It is to be observed that the plaintiff therein while only a lay witness, was nevertheless allowed to testify to how he felt after the dog bit him. No objection was entered as to his competency, nor was any competency question decided by the Oklahoma supreme court. In effect, the upper court ruled that the plaintiff had not carried the burden of proof, because the evidence was speculative. But no burden of proof ever rested upon the instant appellant at the trial level, and appellant need not point out the different scales used in weighing evidence in criminal and civil cases. Like Wigmore, appellants counsel naturally recognizes the rule in civil cases requiring the moving

party to establish by a preponderance of evidence the casual connection between the immediate injury and consequential symptoms (Wigmore, 3rd ed., secs. 568, 1957).

Appellee closes the sub-topic with two citations of federal authority: U.S. vs. McCreary, 9th cir.,105 Fed. 2nd 297, and McConnell vs. U.S., 3rd cir., 81 Fed.2nd 629. In the first of these, the objectionable testimony was appellee's treatment for amebiasis in a veteran's hospital. The question under review does not seek an answer as to the witness' treatment; the appellant was simply asked if he ever suffered from a mental illness. True, counsel, in commencing his offer of proof (which he was not allowed to complete), did mention the subject of treatment, but defense counsel did not represent to the trial court that he was going to prove the treatment with the defendant-witness.

In the Third-Circuit decision, a lay witness, not a party to the action, was called to establish that because of the complained-of injury, the plaintiff-appellant should have stayed in bed, instead of working. This testimony was obviously objectionable.

After conceding that poor memory and failure of recollection are defenses to a perjury charge (appellee's brief, p.13), appellee's counsel declares that when admissible and inadmissible evidence are offered together the trial court is justified in rejecting the whole, citing the Leoptrot case, McDuffie vs. U.S., 5th cir.,

227 Fed. 961, and Huntington vs. U.S., 8th cir., 175 Fed. 950. In the Leoptrot case, the trial court properly ruled out the defendant's minister's testimony on the subject of insanity, but in reviewing the point the Florida supreme court noted that this lay witness could have competently testified. Appellant and the trial judge agreed that there was no such issue in the case at bar.

In McDuffie vs. United States, defense counsel offered such a wealth of material that the upper court characterized it as a mass. The bulk consisted of all the books, checks, letters, and papers of a business. The trial judge was correct in rejecting the evidence, since the defendant did not attempt to specify what part or parts thereof was relevant. In the Eighth Circuit opinion, an original letter and press-copy of the reply were offered together. There was an objection made as to the press-copy, in that it was not properly authenticated. The court sustained the objection to the consolidated exhibit.

Both of these federal cases were concerned with documentary evidence, and in each case more than one piece of evidence was offered at a single time. No such offering of evidence was made in the case at bar; the appellant was asked one, simple question on a limited topic, which anticipated a yes-or-no answer.

Appellee's final position is two-fold: if the con-

templated testimony was erroneously excluded, the error was either cured at the trial level or non-prejudicial to the defendant (Appellee's Brief, p. 14).

As to the first reply, it is sufficiently answered by saying that the record is devoid of evidence of the defendant's mental illness, or defective memory with the exception of the question reviewed and its anticipated answer. Such excluded evidence would have corroborated and supported the defendant's testimony of facts from which poorness of memory would have been deduced. That being the case, the evidence was material to the defense, and its exclusive prejudiced the appellant.

It has been held in several jurisdictions that it is improper to exclude cummulative testimony offered by an accused on a material fact within reasonable limits.

State vs. Trueman, 85 Cap. 1024, 34 Mont. 249

Newsome vs. State, 249, S.W. 477, 93 Tex. Cr. Rep.622

Waller vs. State, 4 So.2nd 917, 242 Ala. 90

Jackson vs. State, 71 So. 2nd 825, 260 Ala. 641

Commonwealth vs. Locke, 138 N.E. 2nd 359, 335 Mass.106

State vs. Billington, 63 N.W. 2nd 387, 241 Minn. 418

Klinedinst vs. State, 266 S.W. 2nd 593, 159 Tex.Cr.Rep

State vs. Tompkins, 277 S.W. 2nd 587 (Mo.)

Further, evidence is not cummulative if no other evidence of the same kind has been offered. State vs. Harris,

desired to show that he not only had poor retentative powers generally, but that he also had an impaired, defective memory because of a mental illness. In light of the rule of the Harris case, such testimony was not wholly cummulative, but independent as well, admittedly material to the issue at hand, and accordingly should have been allowed. At any rate, clearly the excluded testimony was not ruled as being cummulative.

In support of his curred-error contention, appellee's counsel cites two cases from the Ninth Circuit, cases from District of Columbia, Fifth, and Eighth Circuits, and rule 52 (a) Federal Rules of Criminal Procedure. A review of these authorities shows that no prejudicial error occured (or was cured) because the "other testimony" covered the identical subjects which the excluded evidence sought to establish. And in no case was the tendered evidence rejected just before the defense rested, as in this case.

In Strada vs. U.S., 9th Cir., 281 Fed. 143, the defendant was charged with maintaining a common nuisance contrary to the Volstead Act. He sought to show that he only bought grape juice, but the testimony was excluded, the court saying that he had been permitted to testify that he kept and sold only grape juice. Finn vs. United States, 9th Cir., 219 Fed. 2nd 894, is an appeal from the convictions of the Finn twins for "arresting" U.S.

attorney Laughlin Waters. The appellants assigned as error the exclusion of a recital of certain civil and contempt litigation. The reviewing court said that too much testimony had already been allowed them in this respect.

In Furlong vs. United States, 8th Cir., 10 Fed. 2nd 492, the defendant attempted to bring out, while cross-examining a government witness, the interest, bias, and hatred of two government witnesses. Inasmuch as the defendant and a defense witness had directly testified to this interest, bias, and ill will, the upper court found no prejudice in halting the cross-examination of the government witness.

The defendant in DeCamp vs. United States, Dist. of Col. cir., 10 Fed. 2nd 984, was charged with conspiracy to use the mails to defraud, by selling stock in an alleged worthless corporation (supposedly a manufactory of glass caskets). The government chiefly contended that a glass casket could not be made, and introduced testimony to this end. The defense countered and offered to show by the use of a projected motion-picture film, that a casket could be made from this material. The offer was rejected, the court holding that if the film were not properly authenticated it was incompetent; that if the film were so authenticated, then there was other evidence (expert witnesses) of the same type theretofore admitted,

attorney [illegible words]. The [illegible] assigned as cause the reclassing of a receipt of certain civil and contempt litigation. The relator's counsel said that [illegible] had already been [illegible] to this [illegible] object.

In [illegible] vs. United States, 110 Ore., 30 Fed. 592, the defendant attempted to undue one, where cross-examining a government witness, the latter, pale, and retired at two government witnesses. Thereupon the defendant and a defense attempt had difficulty testified to this interest, then, and all with, the upper court found no prejudice in testing the cross-examination of the government witness.

The defendant in [illegible] United States, 2247, 30 Dist. Ore., 30 Fed. 592 [illegible], and employed with [illegible] to use the basis to petition, by setting close in an alleged worthless corporation (supposed) a beneficiary of plate capital). The petitioner solely contended that a plane ticket could not be made, and [illegible] testimony to this end. The defense countered and attempted to show by the use of a polygraph machine [illegible] that a ticket could be made from this material. The effort was resisted, the court holding that if the [illegible] authenticated it was [illegible] like to [illegible] see an authenticated. Then there was other [illegible]

and henceforth the judge at his discretion could keep the film out.

The trial judge in Barshop vs. United States, 5th cir., 192 Fed. 2nd 699, ruled out a coverning letter and a check for about a quarter of a million dollars, which had been mailed eleven days after an income-tax-evasion indictment had been filed against the defendant. It was held that the exclusion was not error, or, if error, cured, because the defendant, after taking the stand in his own defense, repeatedly spoke of the transmittal letter and check, on direct examination.

The rule cited by appellee reads: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." 4 Barron & Holzoff's Fed. Prac. & Proc. (rules edition) p. 437. In other words, if the exclusion of the south-for testimony did not substantially prejudice the appellant, the conviction should be affirmed. But if prejudice followed a new trial must be ordered. In this regard, This Court is asked to bear in mind that the question of the defendant's guilt or innocence was a close one, as evidenced by the jury's inability to agree when first returned to court, the length of time the jury deliberated, its absolute deadlock on counts one, three, four, and six, and its acquittal of appellant's co-defendant on count two and failure to convict her on count one. As

will appear below, error in a close trial may be prejudicial where the same error would be harmless had the government's case been overwhelming, and, as also will appear below, in such a trial reversible error is committed when any testimony appreciably capable of generating a reasonable doubt in the triers' minds is improperly excluded. Appellant submits that the contemplated testimony in the case at bar belonged to this class of evidence.

Appellant anticipates that at time or oral argument, counsel for the government will claim, as he claims in it brief (page 6), that the challenged testimony, given at the Mann Act trial, was positive and unqualified, whereas appellant only attempted to qualify it and render it uncertain when confronted with adverse documentary evidence during the perjury trial, and that, hence, the case was not a close one. In anticipation of any such contention, This Court is respectfully directed to Count V of the perjury indictment (Transcript of Record, page 16, 17; Appellee's brief, second appendix), which recites the allegedly false testimony, and therefrom it will appear that the questioned testimony was most assuredly unpositive and qualified.

III

APPELLEE'S SIX SEPARATE CONTENTIONS MADE UNDER DIVISION C OF HIS ARGUMENT ARE NOT TENABLE.

ARGUMENT

Appellee in his brief (see Appellee's Brief pages 14 to 23 inclusive), under division "C" of his argument makes six contentions which appellant will here attempt to refute.

First: Appellant declares that there is no logic in appellees stated proposition:

"The Courts Remarks Relative to Failure of Recollection as a Defense to Perjury were Not Misunderstood and Were Harmless."

(See C of Appellee's Brief - page 14).

Reference to the record will disclose these remarks plainly constituted a ruling on the pertinancy of evidence sought by the appellant to be adduced during the course of the trial. (See Transcript of Record pages 168 and 169)

This ruling terminated the effort of counsel for appellant to introduce evidence. (See Scupps vs. Reilly 38 Mich 10). This evidence would have been cogent at that particular stage of trial, after the factor of appellants poor recollection had been exhaustedly and let us say cleverly exploited by counsel for the government to the embarrassment of appellants defense. (See appellee's Brief pages 17 to 19)

In the case of Leaptrot vs. State 40 So. Rep. 616 cited and quoted on pages 13 and 14 of Appellants Opening Brief there is a statement from Bishop's Criminal

Law to the effect that one should not be found guilty of perjury if it is shown the false oath was "owing rather to weakness than perverseness of the party." It was on this issue the evidence was offered and the statement of the trial court consituting the ruling complained of cannot in justice be characterized as harmless. The Court eliminated from the issue of willfulness the consideration of offered evidence based upon failure of recollection which well might have generated a reasonable doubt.

Second: The second portion of appellees argument to the effect the court was justified in stopping counsel out of hand where an offer of proof is being attempted in the presence of the jury is not tenable. (See Appellees Brief page 9)

We point to the record itself:

> "Question (by Mr. Cantillon): Mr. Frisone, I'm going to ask you if you ever suffered from any mental illness in the past.
>
> "Mr. Jensen: I'll object to that as being improper and immaterial and irrelevant.
>
> "The Court: I cannot see any bearing upon the issue here."

(See Transcript of Record, pages 168 and 169).

Counsel for appellant motivated by the statement of the trial judge that the court was unable to see

any bearing of such evidence upon the issue attempted to point out to the court the bearing such evidence would have. It is apparent the court did not appreciate the true purpose of the proof when the court declared it did not want an offer of proof and because there was no plea of insanity in the case. The court did not take exception to the manner in which counsel was proceeding. There was no objection made to conduct of counsel. (See Transcript of Record - page 169). Appellee's contention is not reasonable and not supported in any manner by the record. The method to be followed in the making of an offer of proof is, of course, discretionary with the trial judge, and is not to be determined by counsel.

(See Sievers vs. Peters Box and Lumber Co.)

151 - Ind. 642

50 N. E. 877

52 N. E. 399

Birmingham National Bank vs. Bradley

108 Ala 205

19 So. 791

Third: Nor is it plausible that instructions however correct to the jury on the subject of failure of recollection cured the error of refusing to allow the admission during the trial of pertinent evidence upon that very subject. (See Appellee's Brief, pages 19, 20

and 21) The court very properly declared to the jury in its instructions: "You must not consider, for any purpose any evidence offered and rejected" (See Reporters Transcript of Proceedings page 459). This to appellant would appear the only instruction applicable to the subject matter of this appeal.

Fourth: Appellee relies somewhat heavily upon the colloquy between the trial court and counsel for appellant at the Hearing on Motion for New Trial. (See Appendix "A" Appellee's Opening Brief referring to Reporters Transcript Pages 513-515). The proper conclusion from a reading of the Appendix "A" would be that the trial court was confused as to the purpose and nature of the evidence which appellant had sought to produce at the trial. It strongly supports appellant's contention that a full and proper avowal should have been permitted at the trial when the matter came up.

Fifth: The argument of appellee to the effect that counsel for appellant should have been more persistent and should have asked the witness further questions on the subject is not convincing. (See Appellee's Brief page 22). This argument is not supported by a citation of any authorities. On the contrary there is a myriad of authority to the effect, once the court has announced evidence is not pertinent there is no duty of counsel for the party offended by such a ruling to pursue

it further.

Caminetti vs. Pacific Mutual Insurance Co.,

23 C 2nd 94 - 142 Pac 2 741

Ponce vs Marr

47 Cal (2) 159 -- 301 Pac (2) 837

People vs. Duane

21 C (2) 123 -- 130 Pac (2) 123

Heimann vs. Los Angeles

30 C (e) 746 -- 185 Pac (2) 597

Sixth: Nor is there merit in the position appellee takes that because counsel once successfully imposed upon the court counsel's view on the admissibility of certain evidence counsel should have here argued further with the court on the instant ruling (See Appellee's Brief, page 22). On at least one prior occasion the court flatly refused a request by counsel for appellant to make an offer of proof (See Transcript of Record, page 105). On another occasion the court declared to counsel in the presence of the jury that it was the courts policy to discourage offers of proof. (See Transcript of Record, page 107)

Certainly in the instant matter the court had declared its attitude toward the line of evidence sought to be elicited. (See Transcript of Record, page 168-169). With propriety no further offer of proof was in order. (See Scripps vs. Reilly 38 Mich 10) Continuing

to examine a witness contrary to the rulings of the trial court is treading in dangerous territory. It has been held to be contemptuous and the subject of punishment.

Halliman vs. N.S., 182 Fed. (2) 880

Halliman vs. Sup. Ct., 240 Pacific Reporter 788 (Cal).

CONCLUSION

The honest belief of the defendant at the time he gave the prior testimony was the sole issue. The evidence on the charge in question was evenly balanced. The closeness of the case is further evidenced by the statement of the jury itself when it returned to the court room after several hours deliberation announcing it was unable to agree as to the guilt or innocence of either of the defendants on any of the five counts upon which it was deliberating (See Reporters Transcript of Proceedings, pages 485 to 488).

Error which may be harmless is a one-sided case may be prejudicial in a close one. Koteakos vs. U.S., 328 U.S. 750, 90 L.Ed. 1557.

It is not unfair to here assert that any quantum of evidence could have tipped the scale in the instant case. The erroneous exclusion of evidence which might have generated a reasonable doubt of guilt if predjucial error.

Estep vs. U.S., 327 U.S. 114

to examine a witness testifying in the federal or the trial court be treated in determining [illegible] it was [illegible] and the subject of question-ment.

Mattoon vs. U.S., 345 Fed. (2d) 880

Smallwood vs. Sup. Ct., 340 P.(2d) [illegible] Cal. [illegible]

Conclusion

The lawful custody of the defendant at the time he gave the police confession and the main issue. The evidence on the charge is ordered retained. The [illegible] case of the case is further recommended to the attorney of the jury itself when it returned by the court [illegible] several peace deliberation accordingly it was unable to agree as to the guilt or innocence of either of the defendants on any of the [illegible] upon which it was deliberating (See Supreme Tranquility of Procedure, pages 465 to 468).

Error which may be harmful to a [illegible] case may be precluded in a civil case. Coleman vs. U.S., 78 U.S. 790, 80 S.Ct. 1527.

It is not unfair to note except that any examination of evidence could have [illegible] the main in case. The erroneous exclusion of evidence which also have prevented a reasonable doubt as guilt if presented error.

Certainly evidence rejected in a perjury case which tended to establish a lack of the element of wilfulness on the part of the person testifying could have been persuasive and well might have created a reasonable doubt. Keeping here in mind that wilfulness was the sole issue to be determined.

Dearing vs. U.S., 167 Fed (2) 310

Koteakos vs. U.S., 328 U.S. 750 - 90 L.Ed. 1557.

Dated at Beverly Hills, California.

June 5, 1959.

Respectfully submitted,

CANTILLON & CANTILLON
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By_____
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